FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 2 1959
JAMES R. BROWNING, Clerk

No. 892

In the Supreme Court of the United States

OCTOBER TERM, 1958

GRANT FOSTER and FOSTER CONSTRUCTION C. A.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

HARRY BAUM,
MEYER ROTHWACKS,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	3
Statement	5
Argument	9
Conclusion	13

CITATIONS

Cases:

Application of United States (Carroll), 246 F. 2d 762, certiorari denied, 355 U.S. 857	10
Bolich v. *Rubel*, 67 F. 2d 894	10
Civil Aeronautics Board v. *Hermann*, 353 U.S. 322	10
Falsone v. *United States*, 205 F. 2d 734	10
Globe Construction Co. v. *Humphrey*, 229 F. 2d 148	12
Hovey v. *McDonald*, 109 U.S. 150	2
Martin v. *Chandis Securities Co.*, 128 F. 2d 731	12
O'Connor v. *O'Connell*, 253 F. 2d 365	12
Peoples Deposit Bank & Trust Co. v. *United States*, 212 F. 2d 86	12
United States v. *United Distillers Products Corp.*, 156 F. 2d 872	11
Virginian Ry. v. *United States*, 272 U.S. 658	2
Zimmermann v. *Wilson*, 105 F. 2d 583	9, 12

Statutes and rule:

Internal Revenue Code of 1939, Sec. 275(c) (26 U.S.C. 1952 ed., Sec. 275)	11
Internal Revenue Code of 1954:	
Sec. 6501 (26 U.S.C. 1952 ed., Supp. V, Sec. 6501)	11
Sec. 7402 (26 U.S.C. 1952 ed., Supp. V, Sec. 7402)	3
Sec. 7602 (26 U.S.C. 1952 ed., Supp. V, Sec. 7602)	2, 3-4, 6, 11
Sec. 7604 (26 U.S.C. 1952 ed., Supp. V, Sec. 7604)	2, 4-5
Federal Rules of Civil Procedure, Rule 62(c)	2

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 892

GRANT FOSTER and FOSTER CONSTRUCTION C. A.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 159 F. Supp. 444. The opinion of the Court of Appeals (Pet. 5a-14a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1959. (R. 57.)[1] A petition for

[1] References designated "R." are to the appendix to appellants' brief in the Court of Appeals.

rehearing *en banc*, filed on March 31, 1959, was denied on April 8, 1959. (R. 59-75.) Motion to recall the mandate and to stay its issuance, filed on April 17, 1959, was denied on April 17, 1959. (R. 80-83.) On April 24, 1959, Mr. Justice Harlan granted petitioners a stay of the order of the United States District Court for the Southern District of New York on condition that a petition for a writ of certiorari be filed on or before May 5, 1959. A petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether on the facts presented the courts below properly refused to vacate an order, entered pursuant to Sections 7602 and 7604 of the Internal Revenue Code of 1954, directing the production by a bank of records relating to the tax liability of the taxpayer.[2]

---

[2] An additional issue—whether an order allowing supersedeas pending appeal was properly conditioned on the taxpayer's waiver of the statute of limitations as a bar to possible tax assessments—was considered below, but no reason for further review of this issue is asserted in the petition. In any event, the Court of Appeals correctly concluded that the order fell within the scope of Rule 62(c) of the Federal Rules of Civil Procedure, which, in the discretion of the District Court, permitted suspension of the original order "upon such terms as to bond *or otherwise* as it considers proper for the security of the rights of the adverse party". (Emphasis supplied.) *Hovey* v. *McDonald*, 109 U.S. 150, 158-161; *Virginian Ry.* v. *United States*, 272 U.S. 658, 672-673.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7402.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or

fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 1952 ed., Supp. V, Sec. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance,

testimony, or production of books, papers, records, or other data.

(b) [as amended by Sec. 4(i), Act of April 2, 1956, c. 160, 70 Stat. 87, and Sec. 208(d)(4), Highway Revenue Act of 1956, c. 462, 70 Stat. 374, 387] *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 7604.)

STATEMENT

Grant Foster, hereafter referred to as taxpayer, allegedly was a non-resident citizen of the United States during the period 1949 to 1956 inclusive, having lived in Venezuela since April 1939. Prior to

April 30, 1949, his income allegedly was derived from the Foster Construction Company, his individually owned business. On that date, he allegedly became employed by the Foster Construction Compania Anonima, a Venezuelan corporation, hereafter referred to as the foreign corporation. In 1955 or 1956 he allegedly became employed by the Foster Construction Compania Anonima of Costa Rica. From the middle of 1949 to the date of the proceedings here involved, taxpayer claimed complete exclusion, for income tax purposes, of monies earned and purportedly paid to him as salary by the foreign corporation. (R. 3-4, 20.)

The foreign corporation maintained an active commercial banking account, from 1949 to 1956 inclusive, at the New York Agency of the Bank of London and South America, Limited, 34 Wall Street, New York City. The bank retained signature cards, ledger sheets and cancelled checks of the foreign corporation. (R. 4.)

On August 29, 1957, a special agent of the Internal Revenue Service, acting pursuant to Section 7602 of the Internal Revenue Code of 1954, served a summons upon the New York Agency of the bank to produce, for the period 1949 to 1956 inclusive, "Books, papers, records, and memoranda of whatsoever nature or kind, relating to the accounts of Foster Construction C.A. and Grant Foster, including the signature cards, ledger sheets and cancelled checks." (R. 4, 7.)

By letter dated September 9, 1957, the New York Agency of the bank advised the Internal Revenue Service that, in the absence of a court order, it did not propose to comply with the summons. Among other things, the letter stated that taxpayer had "not maintained any account in his own name with the Agency since August 2, 1949" and that it had "no books, papers, records or memoranda relating to any such account of Mr. Foster subsequent to that date"; that taxpayer's "counsel have objected to the examination of any of his records for 1949 on the ground that it is barred by the statute of limitations"; and that "there is no indication in the summons * * * why [the foreign] corporation's records in the Agency's possession should be subject to disclosure in connection with an investigation into an individual's tax liability." (R. 8-9.)

On September 18, 1957, Judge Archie O. Dawson of the United States District Court for the Southern District of New York, upon an *ex parte* showing that there had been no compliance with the summons, ordered the New York Agency of the bank to produce the requested records. The affidavit of Special Agent Nathan Zeldin, submitted to Judge Dawson, alleged, among other things, that "The books and records demanded in the summons are required to authenticate the exclusion of income claimed by the taxpayer to have been received as salary from the Foster Construction C.A. since its inception, and afford the only opportunity for the government to determine whether the income received by the taxpayer from the Foster Construction C.A. actually represents sal-

ary or the distribution of profits in the form of salary." (R. 1-2, 6.)

On September 19, 1957, Judge Dawson, upon the aforementioned order of examination dated September 18, 1957, and upon an affidavit of counsel for taxpayer, granted a motion for an order to show cause why the *ex parte* order previously entered should not be vacated. The motion to vacate was made by the bank; taxpayer and the foreign corporation applied for leave to intervene in support thereof. The affidavit submitted by taxpayer's counsel alleged, among other things, that "the tax liability of Grant Foster for the year 1949 is barred by the statute of limitations", and that there was "no showing that the books and records of Foster Construction, C.A. * * * pertain to the tax liability of Grant Foster or are material and relevant to his tax liability." (R. 9-11, 12, 24, 32.)

On January 23, 1958, District Judge Bicks ordered that the petitions for intervention be granted, and that the motion to vacate the order of September 18, 1957, be denied. (R. 23, 28.) In his memorandum opinion, Judge Bicks, adverting to the statement by taxpayer's counsel that, "upon information and belief, * * * Grant Foster's 1949 return was filed November 15, 1951", concluded that the "sources of his information and the grounds for his belief are not stated", and that "Against this assertion we have an unqualified allegation by a representative of the United States Treasury that said return was filed on October 9, 1953." (R. 26.)

Upon appeal by the taxpayer from the order denying the motion to vacate, the United States Court of Appeals for the Second Circuit affirmed. (Pet. 6a-15a.)[3]

ARGUMENT

1. Both courts below correctly concluded that there was no warrant for vacating the order enforcing the summons for the production of the bank's records. As the Court of Appeals stated (Pet. 7a-8a), "The simple uncontroverted allegations of fact in the agent's affidavit * * * were enough * * * to support the order below. They showed that the inspection sought was in aid of an investigation properly authorized by Congress by § 7602 of the Internal Revenue Code of 1954", *supra*, pp. 2-3. The records sought were (Pet. 8a) "material and relevant to the investigation." In this connection, Special Agent Zeldin's affidavit alleged that (R. 6) "The books and records * * * are required to authenticate the exclusion of income claimed by the taxpayer * * * and afford the only opportunity for the government to determine whether the income received by the taxpayer" was reportable or not. Moreover, there was no suggestion by the bank that (Pet. 8a) "compliance with the order would be unreasonably onerous", or that the investigation was "out of proportion to the end sought". *Zimmermann* v. *Wilson*, 105 F. 2d

[3] In a concurring opinion (Pet. 13a-14a), Judge Lumbard held that the District Court's decision was entitled to affirmance on the additional ground that the taxpayer-intervenor had no standing to appeal.

583, 585 (C.A. 3d). These considerations, as the Court of Appeals concluded, constituted proper criteria for the judicial enforcement of the summons in question, and (Pet. 8a) "an affirmative showing of probable cause for the administrative inquiry is not required." Cf. *Civil Aeronautics Board* v. *Hermann*, 353 U.S. 322; *Application of United States (Carroll)*, 246 F. 2d 762, 764 (C.A. 2d), certiorari denied, 355 U.S. 867. It was enough that the records sought here (Pet. 9a) " 'might have thrown light' on the question, crucial under I.R.C. 1954, § 911(a), whether or not the taxpayer, during the years under investigation received, directly or indirectly, from the foreign corporation salary constituting [non-taxable] 'earned income' or [taxable] distributions of profits." Cf. *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5th); *Bolich* v. *Rubel*, 67 F. 2d 894, 895 (C.A. 2d).

2. There is no conflict of decisions. The contrary contention (Pet. 10-23) is based upon the erroneous premise that in order to open the year 1949 for investigation the Commissioner was required to make some preliminary showing with respect to the possible existence of fraud. But the District Court in effect found, on the conflicting affidavits before it, that taxpayer's return for 1949 was not filed on November 15, 1951, as taxpayer's counsel averred in his affidavit, but on October 9, 1953, in accordance with the (R. 26) "unqualified allegation by a representative of the United States Treasury". Accordingly, since there was considerably less than a five year lapse between the date of the filing of the

return and the date of the beginning of the investigation, the Commissioner was free to make an assessment, without any showing as to possible fraud, if, in fact, taxpayer had understated the gross income reported in his 1949 return by more than twenty-five per cent.[4] It has been held that the broad investigative powers authorized by provisions similar to Section 7602 of the 1954 Code "would be of no practical effect if the [Internal Revenue Service] were barred from making the investigation necessary to ascertain *such a misstatement.*" (Emphasis supplied.) *United States* v. *United Distillers Products Corp.*, 156 F. 2d 872, 874 (C.A. 2d).

Even if it is assumed, *arguendo*, that the Commissioner, in order to justify opening the year 1949 for investigation, was required to make some preliminary showing of a twenty-five per cent understatement of gross income—a contention neither explicitly made in the petition nor supported by judicial authority—such a showing, we submit, was made below in Special Agent Zeldin's supplemental affidavit, in which it was stated that on the basis of the investigation conducted to date, there were (R. 17) "reasonable grounds to believe that *much of the income excluded* by this taxpayer from his personal income tax return has been fraudulently concealed through intercorporate manipulations of capital." (Emphasis supplied.)

---

[4] Section 275(c) of the Internal Revenue Code of 1939; Section 6501(e) of the Internal Revenue Code of 1954.

Even if it is further assumed for purposes of argument that the filing date claimed by taxpayer is correct, and that the Commissioner ultimately would be required to prove fraud in order to make an assessment for 1949, the District Court was justified in concluding that (R. 27) "the Government has set forth sufficient to permit it to pursue its inquiry into the records described in the summons." The supplemental affidavit adverted to above—which the Court of Appeals properly considered as "not essential" to the disposition of the appeal (Pet. 7a)—demonstrated a reasonable basis for at least suspecting that taxpayer, by "intercorporate manipulations of capital", had "fraudulently concealed" reportable income (Pet. 7a.) Cases cited by petitioners (*O'Connor* v. *O'Connell*, 253 F. 2d 365, 369-370 (C.A. 1st); *Zimmermann* v. *Wilson*, 105 F. 2d 583, 586 (C.A. 3d); *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C.A. 5th); *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86, 87 (C.A. 6th); *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731, 735 (C.A. 9th)) as establishing a conflict with the decision below (Pet. 10-11) require no greater showing in order to permit inquiry under the summons provisions of the Internal Revenue Code.

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

HARRY BAUM,
MEYER ROTHWACKS,
Attorneys.

JUNE, 1959

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 50909 1939